



FILE COPY

No. 468

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOHN BARCOTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**SUPPLEMENT TO PETITION FOR WRIT OF
CERTIORARI AND BRIEF IN SUPPORT
THEREOF**

TO THE HONORABLE THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCI-
ATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Since submitting the petition and brief in support thereof, the case of *Whittemore v. Commissioner*, 7 T.C.M. 845 (Dec. 16,700(M)) Docket No. 13421, was received.

Although the Whittemore case was a civil proceedings for the collection of taxes and penalties, the facts therein are strikingly similar to those of our case and the law, particularly pertaining to the net worth theory, is directly in point.

Whittemore was in business since 1909. He operated the Clyde Bar at the time he was investigated.

Office - Supreme Court

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Part of his purchases were by check and part cash from the register. Books of account showing the daily receipts of cash and expenditures were kept. Income tax returns were made on the business. Whittemore had two safe deposit boxes in which cash assets and bonds in a sum exceeding \$78,000 were found. Bank accounts were examined. The reported income was substantially in accordance with the books. Deficiencies were determined on analysis of the bank accounts and on what was determined to be net worth increase. From an examination of Whittemore's assets in 1946, the agents made a net worth calculation as of December 31, 1941, and determined that by reason of increase in net worth Whittemore failed to pay \$41,272.18 in taxes for the years in question.

In reversing the decision of the Commissioner, the Tax Court said:

"Arundell, Judge: The deficiencies determined in this case result from *respondent's total disregard of petitioner's books and records and his use of what he terms the net worth method of determining income*. Fraud penalties have also been found for each of the years before us.

"The evidence clearly establishes that petitioner's returns for the years 1942 to 1945, inclusive, were substantially in accordance with his books. Indeed, respondent frankly concedes this to be true. *Moreover, respondent is unable to point to any source of income in any substantial amount other than that flowing from the operation of the Clyde Bar and associated activities.*" 7 T.C.M. 848. (Italics ours.)

"The main reason we are reluctant to accept respondent's method of determining income is the fact, as we have already stated, that *he can point to no known source of income on the part of petitioner other than that which flowed from the Clyde business*, and we are satisfied that the income from that venture was reported with substantial correctness. But there is another reason of equal importance that throws discredit on respondent's method and that is his failure to determine with any degree of accuracy petitioner's net worth at the starting date of December 31, 1941. *It would be absolutely necessary to know the amount of petitioner's net worth at the beginning of the taxable period before one could determine under a net worth basis a taxpayer's income for succeeding years.*" 7 T.C.M. 848, 849 (Italics ours.)

"Petitioner has been in business since 1909 and his activities included such ventures as construction operations, the carrying on of a drug-store, the operation of hotels, taxicabs, etc. He lived during all of these years very frugally and saved his money."

"The use of a method such as employed by respondent where there are no books and records, or where there is evidence that there has been some tampering with the books and records, or where a taxpayer is engaged in activities other than his regular business, may well be justified. But on the facts here produced, we think the respondent was not warranted in disregarding petitioner's books and records and employing the method he did employ in the determination of the deficiencies covering the years before us." 7 T.C.M. 849.

Petitioner in our case kept books which were disregarded. There was no evidence of tampering there-

with. Income tax returns filed included income from the Oyster House in accordance with the books. There was no source of income which was not reported. Petitioner's net worth as of December 31, 1942 was not known, but was merely assumed, even as it was in the Whittemore case. Moreover, ours is a criminal case where petitioner was charged with failure to report taxes from a specific source.

Since reading the Whittemore case, which involved civil liability only, we are more than ever convinced that judgment of acquittal was imperative and the errors of the Court of Appeals in failing to so decide must be reviewed to prevent the perpetration of a travesty on American jurisprudence.

Respectfully submitted,

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